No. 589

DEC 27 1955

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1955

V. P. SERODINO, INC.,
Appellant.

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

On appeal from the United States District Court for the Southern District of Ohio.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

FINDINGS AND CONCLUSIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Southern District of Ohio, Western Division, are attached as Appendix A. They are not reported; the Court rendered no opinion. The decision of the Interstate Commerce Commission is reported in 292 I.C.C. 681, and is attached as Appendix B.

JURISDICTION

This action was brought under 28 U.S.C. 1336, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered June 17,

1955, upon findings of fact and conclusions of law filed May 16, 1955. A motion of plaintiff for new trial and for more definite findings, filed June 16, 1955, was denied by order of the District Court entered August 24, 1955, and the notice of appeal was filed in that Court by appellant on October 24, 1955. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Secretary of Agriculture* v. *United States*, 347 U.S. 645; *Thompson* v. *United States*, 343 U.S. 549; *American Trucking Assoc.* v. *United States*, 344 U.S. 298.

STATUTE INVOLVED

The pertinent provisions of Part III of the Interstate Commerce Act, 49 U.S.C. 901 *et seq.*, are as follows:

"Sec. 303(b) Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended."

QUESTIONS PRESENTED

1. What is the meaning of the words "transportation of commodities in bulk" as used in 49 U.S.C. 903(b)?

2. Were the findings and conclusions of the Commission in accordance with the provisions of that subsection?

STATEMENT

Serodino holds no operating authority under the Interstate Commerce Act and has engaged in interstate transportation for hire of coal and of scrap iron and steel, in bulk in barges, on the Tennessee and Ohio Rivers, upon the assumption that such transportation was exempt from regulation by 49 U.S.C. 903(b).

Certain regulated water carriers, fearing added competition, made formal complaint to the Commission charging that the uncertificated operations of Serodino in transporting scrap were illegal. By such means, the regulated water carriers sought an interpretative ruling from the Commission to the effect that the 903(b) exemption does not apply to transportation of scrap.

The Commission conducted a full administrative proceeding (292 I.C.C. 681), in which it was agreed that scrap, as customarily transported by Serodino and by water carriers generally, is without wrappers or containers and is received and delivered by the carriers without transportation mark or count; the Commission recognized also that there was no material difference in the custom of the trade as of June 1, 1939, and the present time. Further, the Commission found that Serodino's "operation by water has been confined to the transportation of coal and scrap (not more than three bulk commodities) in open-top barges". The Commission observed, therefore, that

Serodino's "transportation of coal needs no authority, and the same is true of scrap if it is determined that the movement is 'in bulk' ".

There is difficulty in stating fairly what the Commission did with the case, because the approach of its report to the question of statutory meaning is confused. The report seems in places to be construing the words "in bulk" while at other times it refers to "commodities."

While recognizing that scrap is heaped loose, in open-top barges, and is in bulk in the dictionary sense, the Commission found that the regulated carriers have not customarily transported scrap in exempt tows but have chosen to subject their transportation to regulation by including commodities not handled in bulk (or more than three commodities) in each tow. It decided that the words "in bulk" do not carry their dictionary meaning as they are used in 903(b). Instead, the Commission said those words are used to describe "fungibles, which can be poured, scooped, or shoveled, and which generally are of such size that they cannot be handled piece by piece." The Commission also considered the physical characteristics, preparation and handling of scrap as compared with other commodities, and concluded "that scrap is properly characterized as falling within the category of non-bulk commodities."

The Commission thereupon held that the transportation of scrap is not "transportation 'in bulk' " within the meaning of those words in section 903(b); it ordered Serodino to cease and desist from unauthorized transportation of scrap.

In this action to set aside the Commission's order, the Commission admitted that scrap is a commodity but alleged

that it is not a commodity within the meaning of 903(b). The United States admitted that scrap is a commodity, but denied that it can be transported in bulk under the provisions of 903(b).

The court below dismissed the complaint without opinion. The court held (1) that the Commission has authority under 49 U.S.C. 904 to determine what is a commodity in bulk under 49 U.S.C. 903(b); and (2) that the Commission's finding that scrap iron and steel is not a commodity in bulk within the meaning of 49 U.S.C. 903(b) was predicated rationally upon adequate findings supported by substantial evidence. The court stated no conclusion as to the statutory meaning of the words "transportation of commodities in bulk".

THE QUESTIONS ARE SUBSTANTIAL

The interpretation of 49 U.S.C. 903(b) presents a question which is committed by law to the reviewing court. Administrative Procedure Act, Sec. 10 (e), 5 U.S.C. 1009-(e). No claim has been made by the Commission that it holds discretionary power under 903(b). The court below did not find such power in the Commission. It sustained the Commission's order on the basis of 49 U.S.C. 904, which merely authorizes the Commission generally to hear and decide a complaint that a water carrier has failed to comply with the statute.

The question in this case, committed by law to the reviewing court, is both substantial and narrow. It arises from the action of the Commission in re-writing the words of the statute. We urge that the Commission's interpretation of 903(b) is not only wrong, but that it is without any rational basis in law.

Section 903(b) exempts bulk transportation upon three conditions, all found and admitted by the Commission as to Serodino: (1) that the vessels being navigated as a unit are used for bulk transportation of not more than three commodities; (2) that the commodities so transported are loaded and carried without wrappers or containers and are received and delivered without transportation mark or count; and (3) that such practice was the existing custom of the trade as of June 1, 1939.

The Commission not only recognized that all conditions of the statute were met, but it also admitted that the scrap was heaped loose in accordance with the natural and common import of the words "in bulk". It grounded its decision upon a substitution of the word "fungible" for the statutory words "in bulk".

There is no authority, legislative or judicial, for such substitution. When the law was enacted, both the Commission and its Bureau of Water Carriers interpreted the words in the dictionary sense. Administrative Ruling No. 2 (1941). *John L. Goss Corp.*, 250 I.C.C. 101 (1941); *Ralph Raike Applications*, 250 I.C.C. 177 (1942).

The sole precedent upon which the Commission relied to reject the words of the statute and substitute other words therefor was a dictum of its own Division 4 two years after the enactment of 903(b). *Mulqueen Contract Carrier Application*, 250 I.C.C. 436 (1942).

Mulqueen does not constitute a long standing administrative interpretation entitled to control or influence the decision of the reviewing court. It did not go to the entire Commission; the case was not reviewed in court, and was cited only twice prior to the present case. There has not

been any prior case in which the rights of parties were affected by the *Mulqueen* dictum.

All other cases in which the Commission mentioned 903-(b) were actually decided under a different section of the law or involved failure to meet one of the stated conditions of 903(b). *Foreman-Gregory Co.—Exemption, Section 303-(e)*, 250 I.C.C. 51 (1941); *Towage of Floating Objects (Logs and Piling In Rafts)*, 250 I.C.C. 525 (1942); *G. B. Zigler Co., Contract Carrier Application*, 265 I.C.C. 404 (1948); *Callanan Road Improvement Co., Extension—Towage*, 285 I.C.C. 137 (1952).

The action of the Commission in rephrasing the statute according to *Mulqueen* was not and could not rationally be grounded upon the underlying purposes of regulation or declared policy of Congress.

CONCLUSION

We submit that the questions presented by this appeal are substantial and important, and the court below erred in failing to make an independent, judicial interpretation of the statute.

Respectfully submitted,

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December, 1955.

PROOF OF SERVICE

I, Robert N. Burchmore, one of the attorneys for V. P. Serodino, Inc., appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of December, 1955, I served copies of the foregoing statement on the several parties, as follows:

1. On the United States by mailing copies duly addressed with air-mail postage prepaid to:

The Solicitor General, Department of Justice, Washington 25, D. C.
Stanley N. Barnes, Assistant Attorney General, Department of Justice, Washington 25, D. C.
E. Riggs McConnell, Special Assistant to Attorney General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission by mailing copies duly addressed with air-mail postage prepaid to:

Chief Counsel, Interstate Commerce Commission, Washington 25, D. C.
H. Neil Garson, Attorney, Interstate Commerce Commission, Washington 25, D. C.

3. On intervening defendants by mailing copies duly addressed with first-class postage pre-paid to their respective attorneys of record as follows:

Lewin W. Wickes and John W. Hudson, 603 Dixie Terminal Building, Cincinnati 2, Ohio.
John S. Mason, Dravo Bldg., Pittsburgh, Pa.
R. Granville Curry, 631 Southern Bldg., Washington, D. C.
Kenneth J. McAuliffe, 233 Broadway, New York, N. Y.
Harry C. Ames, Jr., Transportation Bldg., Washington, D. C.
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

V. P. SERODINO, INC., Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 3488.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action to set aside an order of the Interstate Commerce Commission coming on for hearing on March 25, 1955, upon the plaintiff's complaint and the defendants' answer thereto, and the court having received in evidence a transcript of the record of the proceedings before the Interstate Commerce Commission, now, after reviewing the said record in its entirety and after hearing the oral arguments of counsel for the respective parties, and after considering the said arguments and the written briefs of counsel, the court makes and enters the following:

FINDINGS OF FACT

1. This is an action to set aside an order of the Interstate Commerce Commission, hereinafter referred to as the Commission, which was entered under Title 49, U.S.C., Sections 903(b), 904 and 909, in a proceeding designated as Docket No. 31147, also embracing Docket No. 31147 (Sub-

No. 1), and Docket No. 31147 (Sub-No. 2), *Union Barge Line Corp.* v. *Rose Barge Line, Inc., et al.,* whereby the Commission found that the interstate transportation of iron and steel scrap by water upon the inland waterways and the Great Lakes, as generally practiced, is not transportation "in bulk" within the meaning of those words in Section 303(b) of the Interstate Commerce Act, 49 U.S.C. 903(b); that the defendant, V. P. Serodino, Inc., has been and is now engaged in the interstate transportation by water of iron and steel scrap, in bargeloads, without a certificate or other form of authority required by Part III of the Interstate Commerce Act, 49 U.S.C. 901-923; and that this defendant should promptly cease and desist from such unauthorized transportation.

2. The proceeding before the Commission was instituted by complaints filed by Union Barge Line, Inc., American Barge Line Company, and Mississippi Valley Barge Line Company. Petitions for intervention of the complaints were filed by Arrow Transportation Company, National Water Carriers Association, Inc., Waterways Freight Bureau, Rail Carriers in Eastern Territory, Inland Waterways Carriers' Freight Association, The Columbia Transportation Company, Inc., and Great Lakes Shipowners Association.

3. The proceeding was assigned for hearing by the Commission before an examiner, and hearings were held March 18, 1953, at Washington, D. C., and May 18, and 19, 1953, at Cincinnati, Ohio. At the hearing the complainants appeared with counsel, interveners in support of the complaint with counsel, and defendant V. P. Serodino, Inc., (plaintiff herein) appeared with counsel. Testimony and evidence were received by the examiner from the parties to the proceeding.

4. The examiner's proposed report was served October 1, 1953, on the parties to the proceeding. In his proposed report the examiner found that V. P. Serodino, Inc., had been engaged in the transportation by water of scrap iron and steel in bargeloads in interstate commerce without a certificate or other form of authority required by Part III of the Interstate Commerce Act, and that V. P. Serodino, Inc., should promptly cease and desist from such unauthorized transportation, unless and until V. P. Serodino, Inc., had obtained appropriate authority. The examiner also found upon the evidence of record that scrap iron and steel as transported by water in interstate commerce did not constitute a commodity in bulk within the meaning of 49 U.S.C. 903(b).

5. Subsequent to the examiner's report, exceptions were filed by plaintiff herein and by certain interveners in support of plaintiff. Replies to the exceptions were filed by the complainants, and interveners in support of complainants. In their exceptions interveners in support of V. P. Serodino, Inc., requested oral argument before the Commission.

6. Oral argument was conducted before the Commission, Division 4, on March 24, 1954, at Washington, D. C.

7. Thereafter the Commission issued its report and order decided June 15, 1954, in which the Commission concluded:

> We conclude that the interstate transportation of iron and steel scrap by water upon the inland waterways and the Great Lakes, as generally practiced, is not transportation "in bulk" within the meaning of those words in section 303(b) of the act; that the defendant, Rose Barge Line, Inc., has ceased the transportation of scrap iron, and that the entry of an order

against it is unnecessary; that the defendant, V. P. Serodino, Inc., has been and is now engaged in the interstate transportation by water of iron or steel scrap, in bargeloads, without a certificate or other form of authority required by part III of the act; and that this defendant should promptly cease and desist from such unauthorized transportation.

8. The Commission also found that V. P. Serodino, Inc., was engaged in the transportation of scrap iron and steel by water in interstate commerce without authority from the Commission; that scrap iron and steel consists of scraps or pieces of iron of various sizes, shapes and weights, having value chiefly for remelting purposes; that scrap as customarily shipped and transported is without wrappers or containers and that it is received and delivered by the carriers without transportation mark or count; that scrap is generally loaded and unloaded by machinery and not by hand; that most scrap is lifted piece by piece, by crane and magnet, because of its large size; that in some instances scrap is unloaded by use of a hand shovel only where a magnet cannot reach a few pieces remaining in the holds of the vessels; that scrap partakes of some of the characteristics of both bulk and nonbulk commodities, but that no comparison was made with any other well-recognized bulk commodities whose variations in size and weights, absence of internal mobility and lack of homogeneity, as between its many pieces, are as pronounced as in the case of scrap; and that marked contrast between commodities which are poured, scooped or shoveled, and between the method of handling scrap iron or steel, makes the latter commodity not a commodity within the exemption provisions of 49 U.S.C. 903(b) and the Commission's decisions thereunder.

CONCLUSIONS OF LAW

From the foregoing facts the court concludes:

1. The court has jurisdiction of this suit and venue is proper under Title 28 U.S.C., Sections 1398, 2284 and 2321-2325; and Section 17(9) of the Interstate Commerce Act, 49 U.S.C. 17(9).

2. The Interstate Commerce Commission had jurisdiction to enter the order complained of under Part III of the Interstate Commerce Act, 49 U.S.C., Sections 901-923.

3. The ultimate finding of the Commission that V. P. Serodino, Inc., has been and is now engaged in the interstate transportation by water of iron or steel scrap in bargeloads without a certificate or other form of authority required by Part III of the Interstate Commerce Act, 49 U.S.C. 901-923, and that V. P. Serodino, Inc., should promptly cease and desist from such unauthorized transportation, was predicated rationally upon adequate basic findings which were supported by substantial evidence.

4. The Commission, under 49 U.S.C., Section 904, has the authority to make a determination of what is or what is not a commodity in bulk within the terms of the provisions of 49 U.S.C. 903(b).

5. The finding of the Commission that scrap iron and steel is not a commodity in bulk within the meaning and terms of 49 U.S.C. 903(b) is supported by substantial evidence and not arbitrary or unreasonable.

6. The order of the Commission requiring plaintiff to cease and desist from unauthorized transportation in interstate commerce is legal and valid.

7. The injunction should be denied and the complaint dismissed.

system and its connecting waterways, generally is such as to bring it within the regulatory provisions[2] of the act. A cease and desist order against the defendants is sought. The principal objective of the complainants, however, is an authoritative determination as to whether transportation of scrap iron is or is not within the exemption provisions of section 303 (b) of the act.

The Waterways Freight Bureau and several associations of water carriers intervened at the hearing in support of the complaints, and several unregulated water carriers[3] intervened in support of the defendants, but introduced no evidence. The complaints were heard upon a common record and will be disposed of in one report.

Only one defendant, Serodino, sought to defend at the hearing. Earl C. Rose, Jr., who was subpenaed as a witness by one of the complainants, showed that although Rose Barge Line, Inc., had towed scrap for Serodino on and between August 15, 1952, and February 1953, it had since then transported none and had ceased such operations. Serodino will hereinafter be referred to as the defendant.

Scrap iron, as now transported in barges on the inland waterways and in self-propelled vessels on the Great Lakes, consists of scraps or pieces of iron of various sizes, shapes, and weights, having value chiefly for remelting purposes. For barge movement, scrap is billed as "scrap iron for remelting purposes only." So far as appears, all of the scrap iron here considered is used for that sole purpose by the various steel mills. The record refers to scrap iron and also to scrap steel. They are practically identical, and the term "scrap" as used herein will refer to both.

Section 303 (b) of the act, enacted in 1940, reads as follows:

> Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended.

The defendant admits that it is engaged as a carrier by water, upon the Tennessee River, in transporting scrap. This is because of its

[2] That is, the requirement of a certificate and published tariff rates if a common carrier, or a permit and schedule of minimum rates if a contract carrier.

[3] Bull Towing Company, George P. Crounse, doing business as George P. Crounse Company, Greenville Towing Company, Inc., Walter G. Hougland Sons, Inc., A. L. Mechling Barge Lines, Inc., and River Company, Incorporated.

belief that such transportation is in bulk, and hence exempt from the requirement of a certificate of authority or the publication of a tariff of rates.

With reference to the parenthetical clause in the statute quoted above, dealing with the "custom of the trade" as of June 1, 1939, the record affirmatively shows that there is no material difference between the custom then and now.

In the determination of the major issue, the parties draw comparisons with the circumstances affecting the transportation of other commodities, some of which are clearly "in bulk." The issue is narrowed by the fact that liquid commodities in tank vessels are exempted specifically by a separate section (section 303 (d)) of the act. Thus, in the further discussion herein there is no need to consider liquid commodities in bulk.

It is agreed that scrap, as it is customarily shipped and transported by the defendant and water carriers generally, is without wrappers or containers, and that it is received and delivered by the carriers without transportation mark or count. This fact brings into sharp focus one of the major disagreements among the complainants, on the one hand, and the defendant and interveners in its support, on the other. To illustrate by skeletonizing the statute somewhat, it reads: "This subsection shall apply only in the case of commodities in bulk which are * * * loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count." The complainants contend that to be exempt as a bulk commodity, the scrap must not only be "in bulk," but that it must, additionally, meet the further limitations or requirements set forth in the above-quoted words following the asterisks. The defendant, in effect, contends that the words following the asterisks are not further limitations or requirements, but instead are merely definitive of "in bulk," as though the statute had been written thus: "This subsection shall apply only in the case of commodities in bulk, i. e., those which are loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count."

The point of view of the regulated water carriers is better understood after observing the physical characteristics of their general method of operation. The chief characteristic, insofar as this proceeding is concerned, is their operation upon the rivers or inland waterways in flotillas of barges or "integrated tows." It is fairly common practice for such a carrier to move at 1 time, in 1 tow, from 16 to 20 loaded barges. The average tow of 1 of the complainants is 12 to 15 barges. The act provides that for the purposes of this exemption "two or more vessels while navigated as a unit shall be considered to be a single vessel." While as a theoretical matter the exemption,

limited to not over three bulk commodities, applies alike to both regulated and unregulated carriers, as a practical matter the former on this record are virtually unanimous in stating that they do transport commodities which are "in bulk," such as sand, gravel, ore, and grain, usually in the same tow with nonexempt commodities. In moving such bulk commodities, the complainants treat them the same as nonbulk articles, by charging their published tariff rates.

The Union Barge Line states that 75 percent of the commodities which it moves are "susceptible" of exemption because in bulk, but they are handled the same as regulated traffic. This carrier estimates that 80 percent of its gross revenue is obtained from traffic susceptible of bulk exemption. In 1953 it lost a job of towing some 300,000 tons of bulk manganese ore, and also the towing of a considerable volume of bulk sulphur. The inference is that this traffic was lost to unregulated carriers.

The Mississippi Valley Barge Line also transports considerable scrap, and no change in its method of handling scrap has occurred in the last 12 years. It has never considered scrap as an exempt commodity. Similarly, it handles coal and sulphur, both admittedly bulk commodities, as regulated traffic for the same practical considerations above pointed out. Witness for this company expressed the view that it would not use the exemption even if scrap were clearly exempt, and even though over 50 percent of its total tonnage is now potentially exempt as bulk traffic. What this carrier fears is not a possible change in status of scrap from nonbulk to bulk (exempt) as it directly affects its own operation, but rather the prospect that such change of status would open the gates to the added competition of unregulated carriers of bulk traffic only.

The towing of barges, and especially of flotillas of barges in integrated tows, appears to be nonexistent on the Great Lakes. Water transport there is largely, if not wholly, in self-propelled vessels, due to the fact that storms on the Great Lakes are sometimes of an intensity equal to those on the ocean; and barges in integrated tows could not survive in such storms. Fundamentally, however, the position of the Great Lakes operators in these proceedings is the same at that of the associations of carriers operating on the rivers. They all express the view that scrap as generally transported upon the lakes and the rivers is not a bulk commodity.

Serodino testified that he (presumably as an individual) was engaged in the scrap business from 1941 to 1946, serving the Wheeling Steel Corporation and the American Rolling Mill Company. He incorporated in 1946. There is no evidence disclosing whether or to what extent his scrap business at that time included any operation on his part as a water carrier. The defendant is now a water carrier.

It began the operation of water terminals at Decatur, Ala., and Chattanooga, Tenn., both on the Tennessee River, in January 1952, and is now engaged in the transportation of coal on the Tennessee River and scrap on the Tennessee and Ohio Rivers. The defendant owns 2 tow boats of 200 and 400 horsepower, respectively, and leases 1 of 800 horsepower. It owns 18 and leases 21 standard steel open-top, or hopper-type, barges. Its operation by water has been confined to the transportation of coal and scrap (not more than three bulk commodities) in open-top barges. Its transportation of coal needs no authority, and the same is true of scrap if it is determined that the movement is "in bulk." The overall tonnage of scrap moved by the defendant is not shown. Rose, during the period previously mentioned, towed 28 bargeloads for the defendant's account.

By way of further attempt to clarify and narrow the issues, it may be stated that extremes in loading, unloading, or transportation of scrap by water may not be considered as controlling here. The generally prevailing practice in the industry must govern. To illustrate, it is conceivable that there could be a straight bargeload or tow of a rare grade of scrap called borings, turnings, and drillings. Such a straight load, meaning not mixed with other grades, would be homogeneous, could be poured, and probably would qualify as a commodity in bulk; but no such shipment has ever moved, so far as this record shows. The question to be determined is one of broad application to the water-carrier industry, both regulated and unregulated.

Evidence of existing practices.—The basic facts are clear and free from dispute. Scrap as an article of commerce originates in almost any town or village, but particularly in cities where waste metal accumulates in manufacturing articles from iron. From these innumerable primary origins carloads, where practicable, are shipped to larger wholesale dealers, some of them located at ports, such as Memphis, Tenn., New Orleans, La., Houston, Tex., where the incoming carloads are consolidated into bargeloads for movement to steel mills, principally in the Pittsburgh, Pa., area.

Most of the scrap is "prepared" scrap. This means that the original unserviceable articles, such as old locomotives, used steel rails, automobiles, cars, machines of all kinds, metal beds, and furniture, have been cut, stamped, sheared, or compressed into pieces, strips, or bundles as dictated by the needs of the consuming consignee, namely, the steel mill. These needs in turn are determined usually by the type of plant furnace, blast or open-hearth, and the sizes of the furnace doors. This preparation frequently occurs before rail movement, but virtually always before the subsequent movement by water.

The preparation of scrap is largely for the purpose of segregating different grades of scrap having different prices and values. An Office

of Price Stabilization regulation in evidence describes in detail the specifications by size, weight, quality, et cetera, of some 35 grades of scrap of dealer and industrial origin, and 35 other grades of railroad origin. Specific ceiling prices per gross ton were therein set for leading scrap-consuming cities on a so-called base grade, No. 1, averaging about $41.[4] The prices for the other grades are indicated by plus and minus differentials. Thus, wrought iron and shafting take a $10 plus differential, while old tinplate bundles take a $10 minus differential. While generally there is no segregation of the separate grades in a barge, the defendant's own witness, a broker with 17 years' experience in the scrap business, testified that the price of each carload of scrap is different, and it differs according to the OPS schedule. Some 20 to 23 carloads of scrap, according to the defendant's exhibit, go into 1 barge to make a single bargeload. This broker has dealt with consumers over a considerable period of time. He has a composite worksheet for each bargeload, and upon the invoice which he sends to the customer are shown the details of the contents of the particular barge. The physical details of the method of doing business have significance in that they accent the further fact that the barge of scrap generally is not one homogeneous mass, as in the case of fungibles such as grain or sand, but is a scrambling of separately valued lots.

There appears no need for extended description of the many grades of scrap. However, several illustrative descriptions are set out in appendix A hereto. No. 1 steel, No. 2 steel, No. 1 bundles, No. 2 bundles, No. 1 busheling, and motor blocks are the grades which predominate in the bargeloads exhibited. It is repeatedly emphasized, however, that practically all loads of scrap by water are mixtures of various grades.

A bargeload of scrap may and often does consist of pieces or units varying greatly in size. Individual particles of scrap called turnings or borings, for example, are so small as to be virtually microscopic. The other extreme is illustrated by a "salamander," by which is meant a large mass of iron that solidifies in the bottom of a blast furnace when it is shut down for relining, possibly 6 feet, or more in its longest dimension, and weighing several tons. By reason of its heavy weight, it is generally loaded or unloaded by means of a sling, instead of a magnet.

Other examples of large individual pieces of scrap moved by water carriers are (1) scrap rails consisting of standard 33-foot rail in the original form, which are handled by slings composed of steel chains

[4] While these OPS (Office of Price Stabilization) prices are now obsolete, they had their origin in actual quotations in the trade, and apparently the approximate relationships of these prices of different grades still prevail.

and placed parallel in an orderly fashion in the hold; (2) large iron wheels, 15 feet in diameter; (3) ingot mold tops, 30 inches square and 22 inches deep, weighing 1,000 to 1,400 pounds apiece; (4) locomotive wheels and tires, some broken and some unbroken; and (5) rail-car axles, 88 inches long, some of which are cut up. Many other examples of scrap are illustrated. These illustrations serve to emphasize the mixed nature of virtually all bargeloads or boatloads in that they are composed of various shapes, sizes, and grades of scrap.

Vessels with scrap are generally loaded and unloaded by machinery and not by hand. Most of the scrap is lifted piece by piece, by crane and magnet, because of its large size. In some instances scrap is unloaded by use of a hand shovel, but apparently this occurs only where a magnet cannot reach a few pieces remaining by reason of the deck "overhang" or in scraping up the leavings littered on the floor, and is not typical of the general practice.

Stress is laid by the complainants upon the general practice, increasingly prevalent since 1936, of compressing relatively thin or porous scrap pieces into so-called bundles. These bundles vary in size, shape, and weight, and constitute a portion of most boatloads, although never a straight load. The bundles are not secured by wire, rope, or ties of any kind, and have no marks identifying them. The defendant points out that bundles frequently fall apart while handling to or from the barge, that a load of scrap is always a conglomerate or heterogeneous mass, and that every bit of the load is ultimately reduced to one common denominator, namely, liquid, flowing, molten metal. The purpose of compressing the bundles, according to the defendant, is solely to meet the requirements and demands of the steel manufacturers, their dimensions being set to meet the openings in the furnaces.

Scrap partakes of some of the characteristics of both bulk and nonbulk commodities. No comparison is made, however, with any other well-recognized bulk commodity whose variations in size and weight, absence of internal mobility, and lack of homogeneity, as between its many pieces, are as pronounced as in the case of scrap. Considerable reliance is placed, rather, upon excerpts from the legislative history of part III of the act. However, no reference is made to any expression in any congressional committee report or to any statement made on the floor of either House of the Congress when the bills which later became part III of the act were under discussion which throws any light upon the intended meaning of the words "in bulk" as used in section 303 (b). Reference is made to a Canadian act from which it appears that iron and steel scrap and pig iron were expressly named therein in a list of commodities as "goods in bulk."

What another Government has done in defining the term "in bulk" is, of course, not controlling here.

Custom in the water-carrier industry.—Not only does section 303 (b) expressly refer to the "existing custom of the trade," but this Commission and the courts have indicated that where words have a special commercial meaning commonly accepted in a trade or industry, as distinguishable from an ordinary, technical, or dictionary meaning, such special meaning as accepted by the industry must govern. See *United States* v. *Seatrain Lines*, 329 U. S. 424; *Black* v. *Interstate Commerce Commission*, 167 F. (2d) 825, affirmed 335 U. S. 818; and *Guyott Construction Co., Inc., Extension—Fuel Oil*, 49 M. C. C. 265. The words "in bulk" here are not mere dictionary words, but are words long used in transportation and in the scrap industry, and moreover, have been construed by the Commission as will presently appear. The meaning thus given to them should govern here unless strong reason to the contrary is shown.

In *Mulqueen Contract Carrier Application*, 250 I. C. C. 436, 439, decided August 5, 1942, division 4 said:

> The term "commodities in bulk" is a common one and is used in describing fungibles, which can be poured, scooped, or shoveled, and which generally are of such size that they cannot be handled piece by piece. Typical of such bulk commodities are coal, ore, sand, gravel, and grains. Pig iron is a processed or semimanufactured product and is of such size and weight that it cannot be poured, scooped, or shoveled. Pigs are often 1½ to 2 feet in length and weigh upwards of 100 pounds. They can be handled piece by piece. The foregoing statements apply with equal force to steel billets. We therefore conclude that pig iron and steel billets are not bulk commodities and their transportation is not exempt under section 303 (b), even though they be transported without wrappers or containers and without transportation mark or count.

Almost 14 years have passed since section 303 (b) was enacted, and nearly 12 years since the foregoing definition by the Commission of the words "in bulk" was announced. Ample time has thus been afforded the water carriers to conform their operations to the law as so interpreted. Apparently this has generally been done, for the evidence is positive that the only unregulated water carriers known to the complainants that have transported scrap are the two defendants. As stated the defendant Rose Barge Lines has abandoned such operation. Thus, Serodino is the only carrier identified by name that is known to be transporting scrap allegedly as an exempt bulk commodity, and the number of such shipments that it has transported is not shown. While a witness for the defendant testified that a number of exempt water carriers on the Mississippi and Ohio Rivers transport scrap from time to time, he failed to identify any such carrier by name. Six unregulated water carriers, interveners in support of the de-

fendant, have indicated their desire to engage in the transportation of scrap as an exempt commodity, if not forbidden by law to do so.

The gross business in steel scrap in this country in 1948 aggregated about $2 billion, and since then the volume apparently has increased. Much of the movement has been by water. Scrap as generally moved by water is readily recognized, as it usually moves in open-top barges at a slow speed of approximately 4 miles an hour upstream. On a trip from Chattanooga, Tenn., to Pittsburgh, for example, a bargeload would pass through about 50 locks, and under several bridges. The evidence is persuasive that very few exempt or unregulated water carriers have engaged in the interstate movement of scrap, and that water carriers generally have accepted and conformed to the definition of bulk commodities as announced by division 4 in 1942.

Reference is made to *John L. Goss Corp. Contract Carrier Application*, 250 I. C. C. 101, decided November 10, 1941, in which appears the following, at page 103:

> The term "in bulk" commonly refers to a loose mass which is poured or thrown into a vessel or vehicle without regard to order, and which is restrained during transportation only by the bottom and sides of the carrying vessel and its bulkheads.

Division 4 was there considering granite, which was carried by the applicant without transportation marks or counts, was not tallied by the applicant in its carrier operation, but was "stowed" in the vessel. It was found not to be a bulk commodity. In a report on reconsideration, 250 I. C. C. 485, decided September 14, 1942, Goss sought authority to transport scrap, showing that it had transported one shipment for its own account in September 1941. Division 4 found, however, that the applicant had not engaged in this transportation prior to January 1, 1940, and that the one isolated shipment in 1941 was not sufficient to justify authorization to transport scrap.

The interveners in support of the defendant rely also on the decision of division 4 in *Raike Applications*, 250 I. C. C. 177, decided January 30, 1942, prior to the *Mulqueen* case, *supra*. No objection to the applications was there made and no oral hearing was held. The applications were dismissed on the ground of the representations made that all of the applicant's operations were exempt under either section 303 (b) or section 303 (d) of the act. In the report therein scrap is specifically referred to only once, and there is no discussion whatever as to whether scrap is or is not in bulk.

In *Columbia Transp. Co. Contract Carrier Application*, 250 I. C. C. 653, at page 668, division 4 said:

> *Commodities in bulk.*—The question next presented is which of the commodities transported by applicant are commodities in bulk within the meaning of section 303 (b). We have no doubt that ore, coal, grain, sulphur, and phosphate

rock, as they are customarily transported, are commodities in bulk within the meaning of section 303 (b).

Pig iron and billets are not commodities in bulk. We so found in *Mulqueen Contract Carrier Application*, 250 I. C. C. 436, and gave in full our reasons therefor. In that report we, in effect, established a test for determining whether a commodity is in bulk. We see no need for repeating what was there said.

The record is not sufficient for us to determine definitely whether such articles as spiegeleisen, ferromanganese, and commercial scrap are commodities in bulk within the meaning of section 303 (b). It is our general understanding, however, that the size and weight of the individual pieces of spiegeleisen and ferromanganese are comparable to the size and weight of pig iron. If that be true, then, in our opinion, these are not commodities in bulk within the meaning of section 303 (b) for the reasons fully set forth in our report in the *Mulqueen* case. It is our further understanding that commercial scrap such as transported by applicant is compressed, and in that form weighs several hundred pounds. If that be true, then, in our opinion, it also is not a commodity in bulk.

The defendant calls attention to the fact that there is no discussion in the latter report of the manner in which compressed scrap was received, handled, or transported. The instant record does show the facts in that respect; also that much scrap is now compressed, and that the average bundle weighs several hundred pounds. If a compressed bundle is not a commodity in bulk as was found in the last-mentioned proceeding, it is difficult to understand how, as a matter of law, a bargeload of scrap consisting in part of compressed bundles could be anything but nonbulk, since the inclusion of a commodity not in bulk in a shipment of an admittedly bulk commodity destroys the exemption.

The test of a commodity in bulk as defined in the *Mulqueen* case, *supra*, has been followed over a period of 11 years in other decisions listed in appendix B hereto.

A further contention is made by the interveners on behalf of the defendant that to find that scrap is not in bulk, and thereby as a consequence to bar its transportation by unregulated "bulk" water carriers, is violative of the national transportation policy. The thought seems to be that a finding that scrap is a nonbulk commodity would be destructive of or harmful to the unregulated water carriers. The facts do not bear out this contention. There are numerous bulk commodities, clearly in bulk, which the exempt carriers are free to carry unaffected by any finding herein. Moreover there is no substantial evidence that bulk carriers by water have ever regularly transported any substantial volume of scrap.

A further thought motivating this contention seems to be that it is more economical for bulk operators than for regulated carriers to transport scrap. The evidence is persuasive to the contrary. The defendant has charged the same rates for the transportation of scrap as the rates of common carriers by water.

General discussion and conclusions.—As generally transported by water, a shipment of scrap includes pieces varying greatly as to size,

shape, weight, and value. Typical shipments include pieces of such large size and weight (compressed bundles, locomotive wheels and axles, salamanders, et cetera) that most of them must be handled piece by piece. Scrap lacks such homogeneity as is known to exist in such commodities as grain, sand, and ore, and typical shipments are not poured, scooped, or shoveled, in any practical sense, and they cannot be so handled.

While scrap as thus handled is loaded and carried without wrappers or containers and without transportation mark or count, much of it is in bundles or compressed in bales which must be handled piece by piece in a manner largely similar to shipments in wrappers or containers, and in a manner similar to pig iron and billets which have been found to be nonbulk commodities.

The marked contrast between commodities thus handled and commodities which can be poured, scooped, or shoveled is reasonably clear and distinct, and we are convinced furnishes a sound basis for a conclusion that scrap is properly characterized as falling within the category of nonbulk commodities.

We conclude that the interstate transportation of iron and steel scrap by water upon the inland waterways and the Great Lakes, as generally practiced, is not transportation "in bulk" within the meaning of those words in section 303 (b) of the act; that the defendant, Rose Barge Line, Inc., has ceased the transportation of scrap iron, and that the entry of an order against it is unnecessary; that the defendant, V. P. Scrodino, Inc., has been and is now engaged in the interstate transportation by water of iron or steel scrap, in bargeloads, without a certificate or other form of authority required by part III of the act; and that this defendant should promptly cease and desist from such unauthorized transportation.

An appropriate order will be entered.

COMMISSIONER MITCHELL did not participate in the disposition of these proceedings.

APPENDIX A

Specifications for certain grades of scrap iron as taken from the OPS regulation (exhibit 3)

No. 1 railroad heavy melting steel. (A. A. R. No. 24.) Clean wrought iron or steel scrap ¼ inch and over in thickness, not over 18 inches in width, and not over 5 feet in length. Individual pieces must be free from attachments and cut so as to lie reasonably flat in charging box. May include new mashed pipe ends, original diameter 4 inches and over. No needle or skeleton plate, agricultural shapes, annealing pots, boiler tubes, grate bars, cast iron, malleable iron, or curly or unwieldy pieces will be accepted.

No. 1 busheling. (A. A. R. No. 10.) Clean wrought iron and/or steel ⅛ inch and over in thickness and/or pipe and/or flues not exceeding 12 inches in any

dimension. May not contain burnt material. Must be free from metal coated, lined or porcelain enameled stock.

No. 1 bundles. New black steel sheet scrap, clippings, or skeleton scrap, hydraulically compressed or hand bundled to charging box size and weighing not less than 75 pounds per cubic foot. (Hand bundles must also be tightly secured and stand handling with a magnet.) Must be free of paint or protective coating of any kind. May include Stanley Balls, or mandrel wound bundles or skeleton reels, tightly secured. May include chemically detinned material. No tin can well be deemed to be detinned unless it has undergone the chemical process for the removal and recovery of tin. May not include electrical sheets, or any material over 0.5% of silicon.

No. 2 bundles. Body and fender scrap, or old black and/or galvanized scrap, hydraulically compressed to charging box size and weighing not less than 72 pounds per cubic foot. May include galvanized, but not vitreous enameled stock, tin plate, terne plate, or other metal coated material. Painted or lacquered material shall not be considered as coated material. May include hydraulically compressed black or galvanized fence wire, light coil spring and any bundles which are excluded from No. 1 bundles by reason of their containing painted, lacquered, lithographed or galvanized material.

APPENDIX B

Specific commodities, found by the Commission to be bulk or nonbulk, as indicated

	Commission decision
Bulk commodity:	
Coal, iron ore, and sulphur.	*Saginaw Dock & Term. Co. Contract Carrier Application*, 260 I. C. C. 657, 663.
Sand, gravel and grains	*Mulqueen Contract Carrier Application*, 250 I. C. C. 436.
Soda ash	*Conners Marine Co., Inc., Contract Carrier Application*, 250 I. C. C. 381.
Salt and slag	*Portland Tug & Barge Co. Ext.—Washington-California*, 265 I. C. C. 325, 335.
Nonbulk commodity:	
Logs and piling	*Towage of Floating Objects (Logs and Piling in Rafts)*, 250 I. C. C. 525, 529.
Lumber	*Foreman-Gregory Co.—Exemption, Section 303 (e)*, 250 I. C. C. 51, 52.
Oilfield machinery, tank steel, steel pipe, oil-drilling rigs, rice in sacks, sugarcane, sugar in bags, oil tanks, piling, engines, oil-well casing, and rocks (individually loaded).	*G. B. Zigler Co. Contract Carrier Application*, 265 I. C. C. 404, 406.
Pig iron and steel billets	*Mulqueen Contract Carrier Application*, 250 I. C. C. 436.
Spiegeleisen and ferromanganese.	*Columbia Transp. Co. Contract Carrier Application*, 250 I. C. C. 653, 668.
Bricks	*Callanan Road Improvement Company Extension—Towage*, 285 I. C. C. 137.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 589

V. P. SERODINO, INC., *Appellant*,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

MOTION OF UNION BARGE LINE CORPORATION, MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN BARGE LINE COMPANY, INLAND WATER CARRIERS FREIGHT ASSOCIATION, COLUMBIA TRANSPORTATION COMPANY, INC., AND GREAT LAKES SHIP OWNERS ASSOCIATION TO AFFIRM.

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IN THE

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No. 589

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Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellees, Union Barge Line Corporation, Mississippi Valley Barge Line Company, American Barge Line Company, Inland Water Carriers Freight Association, Columbia Transportation Company, Inc., and Great Lakes Ship Owners Association, intervening defendants, in the District Court, move that the judgment of that Court be affirmed.

This is a direct appeal from the final judgment entered on June 17, 1955, by a specially constituted three-judge District Court convened pursuant to 28 U.S.C. 1253, 1336, 2284, and 2325, dismissing appellant's complaint which sought to set aside an order of Division 4 of the Interstate Commerce Commission in *Union Barge Line Corp.* v. *Rose Barge Line, Inc.*, 292 I.C.C. 681, as affirmed by the entire Commission on petition for reconsideration. A motion by appellant for a new trial, filed June 16, 1955, was denied by order of the District Court on August 24, 1955, and notice of appeal was filed by appellant in that Court on October 24, 1955. Jurisdictional statement was filed on December 27, 1955.

STATEMENT OF ISSUES

Appellant challenges the construction by the Commission of the words "commodities in bulk" in section 303(b) of the Interstate Commerce Act (49 U.S.C. sec. 903(b)) contending that it erred in concluding that scrap iron as transported by appellant, admittedly "without wrappers or containers" and "without transportation mark or count" was not "a commodity in bulk", and was, therefore, not entitled to exemption under this section*

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* Section 303(b) provides: "Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended."

The question thus presented is whether the Commission was justified, upon the facts in the case, in so construing the statute. After full opportunity to be heard, the question raised by appellant was determined adversely to it (1) by the Hearing Examiner who heard the case before the Commission, (2) by Division 4 of the Commission, (3) by the entire Commission in denying a petition for reconsideration, and (4) by the lower Court.

The case before the Commission arose upon complaints of appellees Union Barge Line Corporation, Mississippi Valley Barge Line Company, and American Barge Line Company. The other appellees joining in this motion, Inland Water Carriers Freight Association, Columbia Transportation Company, Inc., and Great Lakes Ship Owners Association intervened in support of complainants. Railroads in eastern territory also intervened in support of complainants. The complaints were brought under section 304(e) of the Interstate Commerce Act (49 U.S.C. sec. 904) which authorizes the Commission, upon complaint, to "investigate whether any water carrier has failed to comply with any provision of this part [Part III relating to water carriers] or with any requirement established pursuant thereto" and in case it finds failure to comply, to issue "an appropriate order to compel such carrier to comply therewith".

The complaints alleged that transportation by V. P. Serodino, Inc., appellant here, and Rose Barge Line, Inc., of scrap iron by water in towed barges on the Tennessee and Ohio rivers, without appropriate authority from the Commission by certificate or permit, was the transportation of a commodity which could not properly be termed a commodity "in bulk" within the exemption provided in section 303(b) of the Act, and that the transportation was, therefore, unlawful. Complainants prayed that the Commission pursuant to authority under section 304(e) enter an order requiring discontinuance of such unlawful transportation.

Rose Barge Line, Inc., did not contest the case, and discontinued the operation complained of. Appellant defended, making substantially the same contentions that it makes here. These, as stated, were found by the Commission and the lower Court to be unsound.

QUESTIONS RAISED BY APPELLANT ARE WITHOUT SUBSTANCE

Rule 16 of the rules of this Court provides for receiving "a motion to affirm the judgment" of a lower Court "on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument".

There is, it is believed, utter lack of such substantiality in the questions raised by appellant in the present case, for the following reasons, among others.

(a) The Commission's Own Report Deals With and Shows the Unsubstantial Character of Appellant's Contentions.

The Commission discussed in its report the meaning of "commodities in bulk" in section 303(b), in the light of the facts presented, its previous decisions, and the long existing practice in the industry of treating scrap iron as a commodity not "in bulk" within the meaning of section 303(b) and, therefore, not entitled to exemption under that section. "Serodino", the Commission said, "is the only carrier identified by name that is known to be transporting scrap allegedly as an exempt bulk commodity" (p. 688).

The Commission found as to the traffic involved that there were wide variations in the pieces of scrap "as to size, shape, weight, and value", that "Typical shipments include pieces of such large size and weight (compressed bundles, locomotive wheels and axles, salamanders, et cetera) that most of them must be handled piece by piece",

that "Scrap lacks such homogeneity as is known to exist in such commodities [in bulk] as grain, sand, and ore, and typical shipments are not poured, scooped, or shoveled, in any practical sense, and they cannot be so handled" (pp. 690, 691). Appellant's bargeload shipments, it said, were composed of carloads of different types and grades of scrap having different values (pp. 685, 686) and "the barge of scrap generally is not one homogeneous mass" but "is a scrambling of separately valued lots" (p. 686).

The Commission pointed out that the first sentence in section 303(b) contains the requirement that commodities to be exempted must be "in bulk"; that this requirement must first be met before any question can arise as to the later provisions with respect to transportation "without wrappers or containers" and "without transportation mark or count", the latter phrases being those not defining "commodities in bulk", but merely words of limitation where commodities in bulk are first shown to exist. The Commission found that for at least twelve of the fourteen years since section 303(b) was enacted, prior to the decision in this case, such construction had been followed by the Commission and had been adhered to by water carriers generally (p. 688). The Commission further found (p. 691):

> "While scrap as thus handled is loaded and carried without wrappers or containers and without transportation mark or count, much of it is in bundles or compressed in bales which must be handled piece by piece in a manner largely similar to shipments in wrappers or containers, and in a manner similar to pig iron and billets which have been found to be nonbulk commodities.
>
> The marked contrast between commodities thus handled and commodities which can be poured, scooped, or shoveled is reasonably clear and distinct, and we are convinced furnishes a sound basis for a conclusion that scrap is properly characterized as falling within the category of nonbulk commodities.

> We conclude that the interstate transportation of iron and steel scrap by water upon the inland waterways and the Great Lakes, as generally practiced, is not transportation 'in bulk' within the meaning of those words in section 303(b) of the act;"

The Commission, therefore, entered its order requiring appellant to cease and desist from the practice thus found to be unlawful.

This decision of the Commission was upheld by the lower Court upon recitation of basic findings of the Commission. The Court apparently did not regard appellant's attack upon those findings as sufficiently substantial to warrant the writing of an opinion. Lack of substantiality is also indicated by the fact that the only other defendant in the case before the Commission, Rose Barge Line, Inc., did not contest the decision and ceased the operation complained of. Four non-regulated carriers which intervened in support of appellant in the Commission proceeding but which made no showing of handling scrap iron have not attempted to contest the Commission's ruling in Court.

Where as here the Commission's determination requires consideration of both facts and law, in the background of its broad responsibilities under the Interstate Commerce Act and the National Transportation Policy, its findings and conclusions clearly should not be disturbed unless "in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion". *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 536 (1946). No such showing has been made by appellant. Appropriate here is the language of this Court in *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236 (1945), a water carrier public convenience and necessity case:

> "The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted

with a wide range of discretionary authority. *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 65 S. Ct. 1490. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies."

The Commission has acted in accordance with statutory standards in the present case and no substantial basis has been shown for holding that its action is invalid.

(b) The Commission's Decision is Clearly in Accord With Its Long Existing Construction of the Statute and Acceptance Thereof by the Water Carrier Industry. Appellant is a Sole Exception.

Long existing construction of section 303(b) by the Commission clearly confirms the decision here involved. Since the enactment of the water carrier provisions of the Act in the latter part of 1940, the Commission has decided numerous cases involving the question of exemption of transportation of "commodities in bulk" under section 303(b). From the beginning the decisions of the Commission show that "commodities in bulk" have characteristics and qualities which are fundamentally different from those of scrap iron. The leading case, *Mulqueen Contract Carrier Application*, 250 I.C.C. 436, was decided in August, 1942, nearly twelve years prior to the decision in the present case and only two years after enactment of section 303(b). The Commission's construction of the Act in that case has been followed since that time. There the Commission said (p. 439):

"The term 'commodities in bulk' is a common one and is used in describing fungibles, which can be poured, scooped, or shoveled, and which generally are of such size that they cannot be handled piece by piece. Typical of such bulk commodities are coal, ore, sand, gravel, and grains. Pig iron is a processed or semimanufactured product and is of such size and weight

that it cannot be poured, scooped, or shoveled. Pigs are often 1½ to 2 feet in length and weigh upwards of 100 pounds. They can be handled piece by piece. The foregoing statements apply with equal force to steel billets. We therefore conclude that pig iron and steel billets are not bulk commodities and their transportation is not exempt under section 303(b), even though they be transported without wrappers or containers and without transportation mark or count."

This construction of section 303(b) which is in substance the construction which the Commission relies upon in the present case, was not only uniformly followed by the Commission over a period of nearly twelve years but it has been accepted and conformed to by the water carrier industry, with the known exception only of appellant here (p. 688), which began operation in transporting scrap iron in 1952 about ten years after that decision (p. 685).

Great weight is to be accorded the long standing administrative interpretation of the statute by the Commission charged with its enforcement. See *New York, N. H. & H. R. Co.* v. *Interstate Commerce Com.*, 200 U. S. 361, 401 (1906); *Fawcus Mach. Co.* v *United States*, 282 U. S. 375, 378 (1931); *National Labor Rel. Bd.* v. *Denver Bldg. & Const. Tr. Co.*, 341 U. S. 675, 692 (1951); and *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345 (1932). Although section 303 has been amended since the *Mulqueen* decision, there was no attempt to change or modify the provisions of subsection (b) (Amendment June 12, 1948, C. 457, sec. 1, 62 Stat. 386). The failure of Congress to alter the section, notwithstanding the consistent construction by the agency charged with its enforcement "creates a presumption in favor of the administrative interpretation" which is another circumstance entitled to "great weight" in upholding the Commission's interpretation here. *Costanzo* v. *Tillinghast, supra*, p. 345.

Appellant in its Jurisdictional Statement (p. 6) contends that a different interpretation was made by the

Commission prior to the *Mulqueen* case in *John L. Goss Corp., Contract Carrier Application,* 250 I.C.C. 101 (1941) and *Raike Applications,* 250 I.C.C. 177 (1942). In the *Goss case,* the Commission found that although the granite there involved was carried without transportation mark or count it was nevertheless a commodity not in bulk. The decision was thus consistent with the later *Mulqueen case.* On reconsideration (250 I.C.C. 485; September 14, 1942), the Commission was asked to grant authority under the "grandfather" clause to Goss to transport "scrap iron" but such authority was denied because the carrier had made only one shipment in the critical period. It thus in effect held that scrap iron was subject to the Act, for otherwise, if exempt, there was no need of a certificate or permit. As to the *Raike case,* there was no hearing, no contest, no discussion of what constitutes an exempt commodity in bulk, and a mere incidental reference to scrap iron with certain other commodities. Neither the *Goss case* nor the *Raike case* is of any significance here.

Appellant also contends in its Jurisdictional Statement (p. 6) that an administrative ruling, made in 1941, is inconsistent with the present interpretation of section 303 (b). That ruling shows on its face that it was a ruling of the Commission's "Bureau of Water Carriers" and was not the ruling of the Commission itself. However, the ruling is consistent with the *Mulqueen case,* because "pipe" is found to be not a commodity in bulk, even though transported without wrappers or containers.*

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* The question and answer in the ruling are, as follows:

"Question No. 1:

Is pipe, not packaged or bundled, a 'commodity in bulk'?

Answer:

No. A 'commodity in bulk' is one that is not sacked, boxed, bundled, or otherwise assembled but is carried loose and is transported in the vessel without stowage except necessary separation, or necessary trimming or securing to promote the safety of the vessel and cargo. Pipe is not such a commodity."

Appellant also endeavors to minimize the decision in the *Mulqueen case,* pointing out that it has been cited in only two water carrier cases besides the present one (p. 6). Those two cases clearly reaffirm the principles established in the *Mulqueen case. Columbia Transp. Co. Contract Carrier Application,* 250 I.C.C. 653, 668 (1943), holding scrap iron compressed in bundles to be non-exempt, and *Towage of Floating Objects (Logs and Piling in Rafts),* 250 I.C.C. 525, 529 (1942). That it was not cited in some of the other numerous decisions involving the question of "commodities in bulk" does not mean that it was not followed. The contrary is true (p. 688).

(c) The Commission Has Not Departed From Dictionary Definitions of Commodities "in Bulk" But Has Properly Construed the Words in the Context of the Statute and Its Purpose.

Appellant in its Jurisdictional Statement argues (p. 4) that the Commission erroneously "decided that the words 'in bulk' do not carry their dictionary meaning as they are used in 903(b)". This is a misconception.

In the lower Court appellant relied on the definition in Webster's New International Dictionary of "in bulk": "In a mass; not enclosed in separate packages or divided into parts; in such shape that any desired quantity may be removed; as, goods shipped or sold in bulk." The Commission in the present case said (p. 688) "The words 'in bulk' here are not mere dictionary words, but are words long used in transportation and in the scrap industry, and moreover, have been construed by the Commission * * *".

As to the dictionary definition, the words "in mass" indicate a condition in which no portion of the whole can be clearly distinguished from any other portion, as, for example, liquids, sand, gravel, and coal. Moreover, the words in the definition "divided into parts" and "any desired quantity may be removed" indicate that all must

be the same commodity, completely interchangeable, homogeneous, of uniform value, and with no portion clearly distinguishable from any other portion.

This is not the situation as to scrap iron here involved. The Commission, in concluding that scrap iron is not a commodity in bulk within the meaning of section 303(b) pointed out that, as generally transported by water, scrap iron includes "pieces varying greatly as to size, shape, weight, and value" (pp. 690-691), that "Typical shipments include pieces of such large size and weight (compressed bundles, locomotive wheels and axles, salamanders, et cetera) that most of them must be handled piece by piece", that "Scrap lacks such homogeneity as is known to exist in such commodities [in bulk] as grain, sand, and ore, and typical shipments are not poured, scooped, or shoveled, in any practical sense, and they cannot be so handled" (p. 691). Some of the large individual pieces of scrap, the Commission found, include "scrap rails", "large iron wheels", "ingot mold tops", (pp. 686-687) and "motor blocks" (p. 686); also scrap compressed in large bales (p. 691). The wide variation in shape and sizes and the general physical character of the bargeload are clearly inconsistent with an "in bulk" classification.

It is manifest, for example, that "motor blocks", which were included in a number of appellant's shipments (Ex. No. 23), and axles of automobiles and steel rails could not reasonably be regarded as commodities "in bulk" within the meaning of section 303(b). Appellant's own witness was definitely stumped when questioned by the Examiner as to whether steel rails could be considered as "in bulk" (R. 293).

The Commission further pointed out that appellant's bargeload shipments, although loaded together, were composed of clearly identifiable carloads of different types and grades of scrap having different values (p. 685-686). Thus the shipments here under consideration were far

from being those of a single commodity "in bulk" but included a loading together of separate lots of widely varying types and values of scrap, with different melting characteristics and of such character that at destination the different types and grades of scrap could be separated at time of use. In referring to the different grades and value, the Commission said that this circumstance further emphasizes the fact "that the barge of scrap generally is not one homogeneous mass, as in the case of fungibles such as grain or sand, but is a scrambling of separately valued lots" (p. 686).

In numerous cases, including those cited by the Commission in Appendix B to its decision (p. 692), the Commission has found that commodities such as the following are commodities in bulk within the exemption of section 303(b) of the Act:*

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* *McCarren Towing Line, Inc.*, 250 I.C.C. 168, 169 (1942) (coal); *Great Lakes Towing Co.*, 250 I.C.C. 531, 536 (1942) (coal); *James McWilliams Blue Line, Inc.*, 260 I.C.C. 15, 17 (1943) (coal, coke, and sand); *Blaske Lines*, 260 I.C.C. 515, 517 (1945) (coal, sand, gravel, and cement); *Arrow Tug & Barge Co.*, 265 I.C.C. 129, 138 (1947) (coal, limerock, and sulphur); *Saginaw Dock & Term. Co.*, 260 I.C.C. 657, 663 (1945) (coal, iron ore, and sulphur); *Union Sand & Gravel Co.*, 250 I.C.C. 141, 142 (1942) (sand and gravel); *Wood Towing Corp.*, 250 I.C.C. 170, 171 (1942) (sand and gravel); *Kahlke*, 250 I.C.C. 197, 199 (1942) (sand, gravel, and stone); *Mulqueen*, 250 I.C.C. 436, 439, (1942) (coal, ore, sand, gravel, and grains); *G. B. Zigler Co.*, 265 I. C. C. 265, 269 (1947) (sand); *Lester F. Alexander Co.*, 250 I.C.C. 463, 466 (1942) (shells, sand, and gravel); *Erie & St. Lawrence Corp.*, 250 I.C.C. 767, 772 (1943) (phosphate rock, sulphur, grain, and ore); *Conners Marine Co., Inc.*, 250 I.C.C. 381, 385 (1942) (molasses and soda ash); *Portland Tug & Barge Co.*, 265 I.C.C. 325, 335, (1948) (salt, slag, and ores); *Bronx Towing Line, Inc.*, 250 I.C.C. 614, 615 (1943) (mud, sand, and crushed stone).

Coal	Grains
Iron Ore	Soda Ash
Sulphur	Salt
Sand	Slag
Gravel	Mud
Shells	Molasses
Phosphate Rock	Cement

Comparison of such commodities, as both the Commission and the lower Court found, shows that scrap iron is clearly different in its characteristics from those commodities and that it was manifestly proper for the Commission to classify scrap iron as a commodity not in bulk under section 303(b) of the Act.

The Commission's conclusion is further strengthened by comparison with numerous commodities found not to be in bulk including those referred to in Appendix B to the report at page 692. Some of these are as follows:*

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* *Towage of Floating Objects*, 250 I.C.C. 525, 529 (1942) (logs and piling in rafts); *Boston Tow Boat Co.*, 250 I.C.C. 743, 744 (1943) (Christmas trees, lumber, newsprint paper, monumental stone, and pipe); *G. B. Zigler Co.*, 265 I.C.C. 404, 406 (1948) (oil-field machinery, tanks, steel, steel pipe, oil-drilling rigs, logs, sugar cane, oil tanks, piling, and rocks, individually loaded); *Mulqueen*, 250 I.C.C. 436, 439 (1942) (pig iron, steel billets); *Foreman-Gregory Co.*, 250 I.C.C. 51, 52 (1941) (lumber); *Columbia Transp. Co.*, 250 I.C.C. 653, 668 (1943) (spiegeleisen, ferro-manganese, pig iron, billets, scrap iron, compressed in bundles); *J. L. Goss Corp.*, 250 I.C.C. 485, 487 (1942) (scrap iron); *Ohio River Co.*, 260 I.C.C. 501, 505, 506 (1945) (scrap iron); *Blaske Lines*, 260 I.C.C. 515, 517 (1945) (scrap iron in compressed bundles); *Commercial Barge Lines, Inc.*, 260 I.C.C. 555, 557 (1945) (scrap iron); *Shamrock Towing Co., Inc.*, 250 I.C.C. 788, 789 (1943) (bricks); *Callanan Road Improvement Company*, 285 I.C.C. 137, (1952) (bricks).

Logs	Steel tanks
Piling	Oil-drilling rigs
Christmas trees	Sugar cane
Lumber	Oil tanks
Newsprint paper	Rocks individually loaded
Monumental stone	Pig iron
Pipe	Steel billets
Spiegeleisen	Scrap iron, and scrap iron compressed in bundles
Ferro-Manganese	
Oil-field machinery	Bricks

Appellant seeks to distinguish the cases cited by the Commission in its report on the theory that in some instances the transportation was with "transportation mark or count". This is a mistaken theory. The decisions generally contain no reference to transportation mark or count as a factor in respect to the above commodities. Transportation of pipe by weight or of lumber by volume measured in cubic feet does not mean with "transportation mark or count". The general practice of handling traffic by weight is inconsistent with appellant's claims.*

The Commission's construction of section 303(b) is clearly in accord with the statutory purpose "to provide

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* Note that Senator Wheeler who was in charge of the bill which resulted in the 1940 amendment was questioned as to what was meant by "commodities loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count." Senator Burke inquired (86 Cong. Rec. 11765):

> "For instance, commodities such as sand, gravel, coal, salt, various ores, sulfur, crushed stone, and so forth. They are shipped in bulk without wrappers or containers, but necessarily in the shipping document they are measured by weight or by volume; but that fact would not take away the exemption?"

Senator Wheeler replied:

> "No, indeed. * * * They are exempt, because it is recognized that there is not any competition at all with reference to those materials."

for regulation of the rates and services of competing water carriers as part of a broad plan of regulation for all types of competing interstate transportation facilities". *Cornell Steamboat Co.* v. *United States,* 321 U. S. 634, 637 (1944).

An unregulated carrier, such as appellant claims to be, is not subject to the statutory prohibitions against secret rates, discriminations in rates and services, and unnecessary and duplicative services or unfair or destructive practices. To construe the statute as appellant contends would be clearly contrary to the letter of the law and would "frustrate the purpose of Congress". *Cornell Steamboat Co.* v. *United States,* supra, p. 637.

As in *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 549 (1940), the Commission's interpretation is entitled to great weight where it involves " 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new' ". In that case the word "employees" was held to be restricted to those whose activities "affect the safety of operation". The Court held that it was proper to resort to the purpose of the statute, rather than the "literal words" if the words would produce an "unreasonable" result "plainly at variance with the policy of the legislation" (p. 543).

The Commission's construction is also in accord with the rule that exemptions are to be strictly construed. *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Com'n,* 286 U. S. 299 (1932). There the Court held against a contention that the carrier involved was "an interurban railway", in view of the purpose of the statute rather than the meaning to be drawn "from mere dictionary definitions of the words employed by Congress".

The construction of the statute in the present case is plainly correct.

(d) The Commission's Construction of the Statute is Clearly Supported by the Legislative History of the Water Carrier Provisions of the Act.

The conference report on the bill which resulted in the 1940 amendment adding the water carrier provisions to the Interstate Commerce Act pointed out, "This legislation is a forward and fostering step for water transportation as well as the national transportation * * *". The Commission, it said, would have the "duty, to protect and foster water transportation and preserve its inherent advantages" (Report No. 2832, House of Representatives. 76th Cong., 3d Session, p. 88).

The history of the legislation indicates that the general purpose of the water carrier exemption was to permit exclusion where competition with regulated carriers would not be present. The general purpose appears in other exemption provisions of section 303, as for example paragraphs (e) and (g). Note Commissioner Joseph B. Eastman's letter to the Chairman of the House Committee on Interstate and Foreign Commerce, dated March 20, 1939 (reprinted in House hearings on H. R. 2531 and H. R. 4862, 76th Cong., 1st Sess., pp. 1557, 1560), stating that "contract carriers, such as those which carry iron ore, coal, and grain in bulk on the Great Lakes, which are practically noncompetitive with common carriers * * * could be relieved from regulation without harm." A similar purpose was indicated by Senator Wheeler, who was in charge of the bill, (86 Cong. Rec. 11765), and by Mr. Halleck in the House of Representatives (84 Cong. Rec. 9980 (1939)).

The commodities referred to as "in bulk" were such commodities as coal, grain, stone, and ore, which, as the Commission points out in the present case, are fundamentally different from the non-bulk commodity, scrap iron, here involved. Water carriers and rail carriers are in keen competition in the transportation of scrap iron.

The Commission is clearly supported by the legislative history of the statute involved.

In view of the foregoing the above-mentioned appellees respectfully submit that appellant presents no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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January 20, 1956

PROOF OF SERVICE

I hereby certify that on the 20th day of January, 1956, copies of the foregoing document have been served in the following manner:

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